



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case Nos: 4114754/2019 (A) and 4114678/2019 (A)

Final Hearing held by telephone on 24 June 2020

10

Employment Judge A Kemp

Mrs C Thomson

15

Miss C Brown

20

**Claimants
In person**

Harry's Bakery Limited

25

**Respondent
No appearance**

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The first claimant has an entitlement to (i) pay for annual leave under Regulation 14 of the Working Time Regulations 1998 in the sum of **FOUR HUNDRED AND FOUR POUNDS SIXTY PENCE (£404.60)**, (ii) damages for breach of contract of **TWO THOUSAND SIX HUNDRED AND SEVENTY THREE POUNDS SIXTY TWO PENCE (£2,673.62)**, (iii) a statutory redundancy payment of **SIX THOUSAND SEVEN HUNDRED AND TWENTY ONE POUNDS EIGHTY PENCE (£6,721.80)** in respect of which sums the respondent is ordered to

E.T. Z4 (WR)

make payment, and (iv) a compensatory award for unfair dismissal of **FOUR THOUSAND TWO HUNDRED AND SIXTEEN POUNDS EIGHTY PENCE (£4,216.80)** in respect of which the respondent is ordered to make payment subject to the following provisions which apply –

For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:

- (i) The monetary award is **£4,216.80.**
- (ii) The prescribed element is **£2,259.00**
- (iii) The date to which the prescribed element relates is **24 June 2020**, and the prescribed period is that from **23 January 2020**
- (iv) The amount by which the monetary award exceeds prescribed element is **£1,957.80.**

2. The second claimant has an entitlement to (i) pay for annual leave under Regulation 14 of the Working Time Regulations 1998 in the sum of **ONE HUNDRED AND NINETY POUNDS TEN PENCE (£190.10)**, (ii) damages for breach of contract of **ONE THOUSAND EIGHT HUNDRED AND TWENTY THREE POUNDS SIXTY TWO PENCE (£1,823.62)**, (iii) a statutory redundancy payment of **TWO THOUSAND THREE HUNDRED AND SIXTY THREE POUNDS SIXTY TWO PENCE (£2,363.62)** in respect of which sums the respondent is ordered to make payment, and (iv) a compensatory award for unfair dismissal of **FOUR THOUSAND EIGHT HUNDRED AND SEVEN POUNDS FOUR PENCE (£4,807.04)** in respect of which the respondent is ordered to make payment subject to the following provisions which apply -

For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:

- (i) The monetary award is **£4,807.04.**
- (ii) The prescribed element is **£2,652.16**
- (iii) The date to which the prescribed element relates is **24 June 2020**, and the prescribed period is that from **16 January 2020**
- (iv) The amount by which the monetary award exceeds prescribed element is **£2,154.88.**

REASONS

5

Introduction

1. This Final Hearing took place for remedy only, following the earlier Preliminary Hearing before me. It was held by telephone under Rule 46.
10 I was satisfied that it was appropriate to do so as the respondent has not entered appearance, and did not participate in the call. In compliance with the Order from the earlier hearing before me the claimants had each sent written documents setting out the relevant details for their cases, and accompanying vouching.
- 15 2. It was noted that the respondent has ceased to trade at the previous address, and a new address is given as above. I have substituted that address for the respondent in light of that.
- 20 3. This is a claim for pay for annual leave, breach of contract, a statutory redundancy payment, and for unfair dismissal.

Facts

- 25 4. I made the following findings in fact:
 - (i) **The first claimant**
5. The first claimant was employed by the respondent from 3 January 2007
30 to 2 November 2019. Her date of birth is 18 January 1972.
6. The first claimant does not have a copy of the contract of employment, but recalls signing such a document when her employment started.
- 35 7. The first claimant worked six days per week when employed by the respondent for 39 hours per week and with eight hours of overtime.

8. She was paid gross weekly wages of £435.07, a net wage of £346.78 per week. The deductions included employee pension contributions of £21.75 and there were employer contributions to pension separately of £13.05 per week.
9. The holiday entitlement was the statutory amount of 28 days per annum. The holiday year commenced on 5 April each year. In the period from 5 April 2019 until termination the claimant took nine days holidays.
10. The first claimant has not received pay for accrued annual leave, notice pay, or a redundancy payment from the respondent from or after the termination of her employment.
11. She looked for jobs daily on websites. She received job seekers allowance after the termination of her employment, She commenced new employment with Morrisons on 17 November 2019, and was paid a total of £981.42 for the period from then until it terminated on 30 December 2019. She commenced new employment with Serco on 6 January 2020, earning net pay of £221.35 per week and with £9.63 per week employer pension contribution.

(ii) The second claimant

12. The second claimant commenced her employment with the respondent on 3 August 2008, and it terminated on 31 October 2019. Her date of birth is 12 March 1967.
13. The second claimant worked a pattern of four days per week, either Mondays to Thursdays or Wednesdays to Saturdays. When working the first pattern she worked for seven hours on Monday, and otherwise for four hours per day a total of 19 hours. When working the second pattern she worked a total of 16 hours. The average of the working hours is 17.5 hours per week, over a period of four days.

14. The holiday entitlement was the statutory entitlement, and the holiday year commenced on 5 April each year. In the year from 5 April 2019 to termination the second claimant took two weeks, or eight days, holidays.

5 15. The pay received by the claimant in the period prior to termination was as follows:

	Date	Gross Pay	Net pay	Employee Pension	Employer pension
	10/11	131.36	124.79	6.56	5.67
10	3/11	138.83	179.40	9.43	5.67
	27/10	131.36	124.79	6.56	5.67
	20/10	133.83	179.40	9.43	5.67
	13/10	131.36	124.79	6.56	5.67
	6/10	188.83	179.40	9.43	5.67
15	29/9	131.36	124.79	6.56	5.67
	22/9	188.83	179.40	9.43	5.67
	15/9	131.36	124.79	6.56	5.67
	8/9	188.83	179.40	9.43	5.67
	1/9	131.36	124.79	6.56	5.67
20	25/8	188.83	179.40	9.43	5.67

16. The second claimant did not receive accrued pay for annual leave, notice or a redundancy payment from the respondent.

25 17. Since termination of employment the claimant has sought new employment by searching a website daily. She has not found new employment, and has been in receipt of job seekers allowance.

The law

30

18. The entitlement to holidays is regulated by the Working Time Regulations 1998 ("the Regulations"). They are made to give effect to the Working Time Directive 93/104/EC and require to be construed purposively in light of that.

35

19. The Regulations provide for an entitlement to annual leave under Regulations 13 and 13A, which amount to a total of 5.6 weeks per annum, capped at 28 days.
- 5 20. Regulation 14 has provision for the entitlement where a worker's employment starts and/or ends in the leave year, as occurred to the claimant. It is a pro-rata calculation, and sets out the amount that is due.
- 10 21. The Tribunal has jurisdiction to consider a claim for breach of contract by the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. The present claim, arising on termination, falls within the provisions of that Order. The claimant has a right to a minimum period of notice under section 86 of the Employment Rights Act 1996, and is to twelve weeks where the employment is more than twelve continuous years, and eleven weeks where the employment is more than eleven continuous years.
- 15 22. A person who is made redundant is entitled to a statutory redundancy payment. The calculation for that is set out in section 162 of the Employment Rights Act 1996 ("the Act") and is a function of age, earnings and years of continuous service.
- 20 23. A person who is unfairly dismissed is entitled to financial compensation. There is no entitlement to a basic award as that is superseded by the redundancy payment. There is an entitlement to a compensatory award which is calculated under section 123 of the Act on the basis of loss sustained. That loss is exclusive of the award for notice pay, as breach of contract, otherwise there would be double recovery. There are provisions for recoupment of benefits which then apply to those in receipt of benefits after termination of employment.
- 25 30

Discussion

- 35 24. I accepted the evidence of the claimants. The respondent has chosen not to defend the claims. I was satisfied with the evidence placed before me both to establish the earnings from the respondent, the efforts at mitigation of loss which I accept took place, and as to the earnings of the first

claimant. I have made awards in favour of each claimant as above, and set out the detail below.

(i) The first claimant

5

25. I made the following awards:

(a) Annual leave

10

The entitlement is to 28 days per annum. The first claimant worked six days per week. The pro rata entitlement for the period to termination I calculate to be 16 days. The first claimant had taken 9 days, and 7 days is outstanding. That is paid at the daily rate of £57.80, being the weekly pay divided by the six days worked. For 7 days the total is £404.60.

15

(b) Breach of contract

20

The entitlement is to twelve weeks' pay. The calculation for that is the net pay of £346.78, together with both employee and employer pension contributions of £21.75 and £13.05 respectively. The total is £381.58 and for twelve weeks the total is £4,578.96. The claimant had some earnings during that period, and as the claim is for breach of contract those earnings are I consider to be deducted from that amount. There were six weeks of earnings at Morrisons totalling £981.42, and a further four weeks' earnings at Serco totalling £923.92. These are deducted leaving a net sum of £2,673.62. Whilst an employer may pay in lieu of notice as that was not done I am bound, I consider, to make that deduction.

25

(c) Statutory redundancy payment

30

The claimant has 12 years of continuous service, 6 of which were when she was over the age of 41. That gives rise to an entitlement of 15.5 weeks' pay. The calculation of that pay is the gross sum of £435.07 together with £13.05 employer pension contributions. The total sum due is £6,721.80.

35

(d) Compensatory award

5 The starting point is the net pay with the respondent of £346.78 per week, added to which are the two sets of pension contributions, leading to a total of £381.58. Deducted from that is the net pay and pension benefit from Serco totalling £230.98. The difference between them, the loss of earnings, is £150.60. The period of loss starts from the end of the notice period on 23 January 2020. There are 15 weeks to the point of this Judgment, a total of £2,259. I am prepared to award a further 13 weeks for future loss, given the circumstances overall and the fact that the present income is likely to continue for that period. That is a total of 10 £1,957.80. The total for the compensatory award is therefore £4,216.80. It is subject to the recoupment provisions set out below.

(ii) The second claimant

15 26. I made the following awards:

(a) Annual leave

20 The entitlement is to 5.6 per annum. The first claimant worked four days per week. The entitlement is to 22.4 days of annual leave per year. The pro rata entitlement for the period to termination I calculate to be 13 days. The first claimant had taken 8 days, and 5 days is outstanding. That is paid at the daily rate of £38.02, being the average weekly pay over the twelve week period set out above, which is £152.09 divided by the four days worked. For 5 days the total is £190.10.

25

(b) Breach of contract

30 The entitlement is to 11 weeks' pay. The calculation for that is the net pay of £152.09, together with both employee and employer pension contributions of £8.00 and £5.67 respectively. The total is £165.76 and for 11 weeks the total is £1,823.36. The claimant had no earnings from employment. I award that sum.

35

(c) Statutory redundancy payment

The second claimant has 11 years of continuous service, all of which were when she was over the age of 41. That gives rise to an entitlement of 16.5 weeks' pay. The calculation of that pay is the gross sum of, on average, £135.25 together with £8.00 of average employer pension contributions. The total of those for those weeks is £2,363.62.

(d) Compensatory award

The starting point is the net pay with the respondent of an average £152.09 per week, added to which are the two sets of pension contributions, leading to a total of £165.76. The loss starts from the end of the notice period on 16 January 2020. There are 16 weeks to the point of this Judgment, a total of £2,652.16. I am prepared to award a further 13 weeks for future loss, given the circumstances overall and that the present income is likely to continue in my assessment for that period. That is a total of £2,154.88. The total for the compensatory award is therefore £4,807.04. It is subject to the recoupment provisions set out below.

Recoupment

27. The claimants each stated in evidence that they did receive benefits after the dismissal. The Employment Protection (Recoupment of Benefits) Regulations 1996 therefore apply to the compensatory award. For the purposes of those Regulations details are required as set out in the Judgment.

28. The effect of the Regulations is that all of the compensatory award is not yet payable. That part by which the monetary award exceeds the prescribed element (which in this case is the part of the compensatory award for future loss in each case) is payable by the respondent now. There is a period of 21 days after this Judgment is sent to the parties for the service on the parties of a Recoupment Notice, which sets out the amount if any that must be deducted from the prescribed element (which in this case is the part of the compensatory award for past loss in each case) and paid to the Department for Work and Pensions. The balance of the prescribed element is then payable to the claimant. If there is no

Recoupment Notice served within that time, the full amount of the prescribed element is payable to the claimants save where there are sufficient reasons for any delay in serving such a notice by the Department.

5

10

15

Employment Judge:
Date of Judgment:
Date sent to parties:

Alexander Kemp
01 July 2020
03 July 2020